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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 528

PEIRCE COOMBES, PETITIONER,

vs.

MILTON E. GETZ, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

W. H. DOUGLASS,
JOSEPH L. LEWINSON,
NAT SCHMULOWITZ,
J. C. McKINSTRY,
JOSEPH HABER, JR.,
CHARLES L. FIREBAUGH,
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(36,342)

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No. 528

PEIRCE COOMBES, PETITIONER,

vs.

MILTON E. GETZ, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Peirce Coombes respectfully shows to this Honorable Court:

A.

Summary Statement of the Matters Involved.

On December 22, 1925, petitioner filed a complaint in the Superior Court of the City and County of San Francisco, California, as a creditor and on behalf of himself and all other creditors, against respondent,

Milton E. Getz, and other directors of Getz Bros. & Company, a corporation, to recover money which petitioner alleged in the complaint had been misappropriated or embezzled by officers of said corporation. Petitioner filed a second amended complaint (R. 1) in said cause which was also amended. The complaint alleged that respondent and other directors of the corporation were liable for the embezzlement or misappropriation of money by its officials under the provisions of Section 3 of Article XII of the California Constitution, which was as follows:

> "SEC. 3. Each stockholder of a corporation, or joint-stock association, shall be individually liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association. The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association, during the term of office of such director or trustee."

The respondent, Milton E. Getz, demurred (R. 22) to the complaint as amended, and on March 18, 1930, his demurrer was sustained with leave to amend the complaint in ten days. Petitioner declined to amend his complaint and on April 14, 1930, judgment was entered against petitioner on the demurrer (R. 32). On

April 21, 1930, petitioner served his notice of appeal (R. 33) and appealed said cause to the Supreme Court of California.

Thereafter, at the general election November 4, 1930, and while said cause was pending in the Supreme Court on appeal, the above section of the California Constitution was repealed.

On January 2, 1931, respondent served his notice of motion (R. 35) on petitioner for an order dismissing the appeal, which said motion was based on the ground that petitioner's cause of action alleged in the complaint had been extinguished and was abated by reason of the repeal of the above section of the constitution.

Briefs were filed in said cause in support of and in opposition to the motion to dismiss and on July 23, 1931, the Supreme Court handed down its judgment and decision (R. 37) sustaining respondent's motion to dismiss and dismissing said cause, and alleged as ground therefor that

> "where a right is created solely by statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession or perfected by final judgment, the repeal of the statute destroys the remedy."

The decision of the court also held that this holding by it did not impair the obligation of contracts in violation of the Constitution.

On August 12, 1931, petitioner filed his motion for a rehearing (R. 39) in said cause, which motion, among other grounds urged for a rehearing, stated that the

holding of the Supreme Court that the repeal of Section 3 of Article XII of the California Constitution acted retroactively and destroyed vested rights of action based thereon impaired the obligation of contracts in violation of Section 10 of Article I of the Federal Constitution.

On August 21, 1931, the Supreme Court made the following order (R. 50):

> "The petition for rehearing in the above entitled matter is denied. Langdon, J., voting for a rehearing. Opinion to follow."

The opinion of the Supreme Court on that date became final.

On October 23, 1931, the Supreme Court filed its opinion on the motion for a rehearing (R. 51), which opinion among other things, stated:

> "A rehearing was sought in this case and denied by this court on August 21, 1931, and this opinion was to follow.
>
> "The contention was *again* made that the decision of the court *impairs* the *obligation* of *contracts* and thereby *violates the Constitution of the United States*. We are satisfied that it does not and we find nothing in the authorities presented to us to change our conclusion in that regard."

The opinion on petition for rehearing further held that by virtue of the reserved power to amend or repeal laws concerning corporations contained in Section 1 of Article XII of the California Constitution became a part of the contract of creditors so as to prevent an

impairment of the contract created by Section 3 of Article XII of the California Constitution, and the opinion then holds:

> "It is true that the reserved power, however broad, cannot be exercised so as to impair a vested property right (*Western Union* v. *Hopkins*, 160 Cal. 106), but the remedy formerly given by the section in question was not such a right, and its repeal did not therefore constitute a denial of due process of law."

B.

Reasons Relied on for the Allowance of the Writ.

This court should issue the writ herein prayed for, for the following reasons:

1. The decision of the California Supreme Court in this case is a final judgment of the highest court of the State and it denies to petitioner rights and privileges under Section 10 of Article I of the United States Constitution specially set up and claimed by petitioner as provided by Section 344, Title 28, U. S. Code (Sec. 237 Judicial Code).

2. When the motion of respondent was filed in the Supreme Court of California to dismiss this cause petitioner could add nothing to the record, but in his brief and argument specially set up and claimed that respondent's contention in his motion to dismiss the appeal that the repeal of Section 3 of Article XII of the California Constitution extinguished and abated petitioner's right of action would impair the obligation of his contract on which his cause of action is

based in violation of Section 10 of Article I of the United States Constitution; that petitioner made such contention is specifically stated in the opinion of the court on the motion for rehearing (R. 51); that petitioner made the same contention in his motion for rehearing (R. 39), which was the first opportunity he had to add to the record of said cause in the Supreme Court after the motion to dismiss was filed. This is a timely setting up and claiming of a federal right as provided by and under Section 344, Title 28, U. S. Code, and as is held by this court. (Forbes *v.* State Council, etc., 216 U. S. 396, 399 and citations; Grannis *v.* Ordean, 234 U. S. 385, 392; Saunders *v.* Shaw *et al.*, 244 U. S. 317, 320; Missouri *ex rel. v.* Gehner, 281 U. S. 313, 320.)

3. That the decision of the California Supreme Court that the repeal of Section 3 of Article XII of the California Constitution acted retroactively so as to extinguish and abate petitioner's accrued and vested right of action against the directors of Getz Bros. & Company for misappropriation or embezzlement of money of the corporation against petitioner's contention impairs the obligation of contracts in violation of the contract clause of Section 10 of Article I of the United States Constitution and destroys vested property rights of petitioner. (Converse *v.* Hamilton, 224 U. S. 243, 253; Selig *v.* Hamilton, 234 U. S. 632, 638; Bernheimer *v.* Converse, 206 U. S. 516; *Platt v. Wilmot*, 193 *U. S.* 602, 613; Whitman *v.* National Bank, 176 U. S. 559, 563, 565, 567; Huntington *v.* Attrill, 146 U. S. 657; Hawthorne *v.* Calef, 2 Wall. 10, 23; 14 *C. J.* 973; 12 *C. J.* 977, Sec. 566.)

4. The holding of the California Supreme Court in its decision which was made against the contention set up and claimed by petitioner in said court that this cause of action was created solely by statute and was dependent alone upon Section 3 of Article XII of the California Constitution, and that the repeal of said section repealed and abated petitioner's cause of action impairs the obligation of contracts between petitioner and other creditors and the directors of said corporation which had accrued prior to said repeal and that said holding violates the provisions of Section 10 of Article I of the United States Constitution which provides that no State shall pass any law impairing the obligation of contracts; that said opinion of said court is in conflict with the opinions of this court construing the effect of the repeal of similar constitutions and statutes on contracts that had accrued thereunder. (Ochiltree *v.* Railroad Co., 21 Wall. 249; Platt *v.* Wilmot, 193 U. S. 602, 613; Hawthorn *v.* Calef, 2 Wall. 10, 23; Irvin *v.* Elliott, 203 Fed. 82.)

5. The holding of the California Supreme Court in its decision on the petition for rehearing that the "remedy formerly given by the section in question" (Sec. 3, Art. XII, California Constitution) was not a vested right impairs the obligation of contracts in violation of the contract clause of Section 10 of Article I of the Federal Constitution for the cause of action in this case had accrued and become vested before the repeal of said section, and this holding of the California Supreme Court is in conflict with decisions of this court on similar questions. (Seibert *v.* Lewis, 122 U.

S. 284, 294; Edwards *v.* Kearzey, 96 U. S. 595, 599; Railroad *v.* Wall. 241 U. S. 87; Hawthorne *v.* Calef, 2 Wall. 10, 23.)

6. The holding of the California Supreme Court in its opinion on the petition for rehearing that the reserved power under Section 1 of Article XII of the California Constitution authorizing amendment or repeal of laws "concerning corporations" and incorporated in every contract between creditors and corporations equally with Section 3 of Article XII of said Constitution and the effect thereof was to destroy or render ineffectual petitioner's contract under Section 3 of Article XII of said Constitution after its repeal impairs the obligation of contracts in violation of the contract clause of Section 10 of Article I of the United States Constitution because:

(*a*) The reserved power to amend or repeal laws concerning corporations could not impair contracts created under Section 3 of Article XII of said Constitution between directors of the corporation and creditors for this liability is not to the corporation, as said by this court in Converse *v.* Hamilton, 224 U. S. 243 on 253, and in Selig *v.* Hamilton, 23 U. S. 652 on 658. (Stanislaus County *v.* San Joaquin, etc., Co., 192 U. S. 201; also 7 Fletcher on Corporations, 7597, Sec. 4310, and page 7604, Sec. 4316.)

(*b*) The laws concerning corporations that may by repeal affect contracts are those only which affect the contract between the corporation and the State, the shareholders and the corporation, and the State and the shareholders, and not contracts between directors

and creditors only. 7 Fletcher on Corporations, 7604, Sec. 4316. (Tyler *v.* Dane County, 289 Fed. 843, 855 and citations; Shields *v.* Ohio, 95 U. S. 319, 324-25; Greenwood v. Freight Co., 105 U. S. 13, 18-19; Tomlinson *v.* Jessup, 15 Wall. 454, 458-9.)

(*c*) While all laws in force at the time a contract is made bearing upon the subject of the contract become a part of the contract, Section 1 of Article XII of the Constitution of California containing the reserved power to amend or repeal laws concerning corporations did not relate to the subject of the contract between petitioner and other creditors, and the directors of the corporation by virtue of Section 3 of Article XII of the California Constitution. (Lake Shore Ry. *v.* Smith, 173 U. S. 684, 687-8; Shields *v.* Ohio, 95 U. S. 319, 323; Tomlinson *v.* Jessup, 15 Wall. 454, 459.)

(*d*) Vested rights of property (and a cause of action is a property right: Angle *v.* Chicago, etc., Ry., 151 U. S. 1, 19; Muir *v.* Railroad, 247 Fed. 888, 897) cannot be impaired or destroyed under the reserved power to amend or repeal laws affecting corporations. (Stanislaus County *v.* San Joaquin, etc., Co., 192 U. S. 201, 213; Osborne *v.* Nicholson, 13 Wall. 654, 662; Pritchard *v.* Norton, 106 U. S. 124, 132; 7 Fletcher on Corporations, 7597, Sec. 4310, and page 7604, Sec. 4316; 2 Cooley Const. Limitations, 756.)

(*e*) The reserved power to amend or repeal laws concerning corporations contained in Section 1 of Ar-

ticle XII of the California Constitution applies only to "laws that may be hereafter passed pursuant to this section," and not to Section 3 of Article XII simultaneously adopted. Also Section 1 of Article XII must be construed in connection with Section 16 of Article I of the Constitution and Section 404 of the Civil Code of California prohibiting the passing of laws impairing obligation of contracts and providing that the repeal of laws does not take away or impair existing remedies. Western Union *v.* Hopkins, 160 Calif. 106; Railroad Tax Cases, 13 Fed. 722, 754; Thompson on Corporations, 3rd Ed., Vol. 1, pages 458, 462, 465.

7. The holding of the California Supreme Court in its decision on petition for rehearing that although "the reserved power, however broad (to amend corporate laws) cannot be exercised so as to impair a vested property right," but that the remedy formerly given by the section in question (Sec. 3, Article XII, of the California Constitution) was not such a right" is in conflict with decisions of this court which hold that the remedy is a vested right and becomes a part of the contract if its repeal or destruction would impair or render the contract unenforceable and violates the contract clause of Section 10 of Article I of the Federal Constitution. (1 Cooley Const. Limitations, 592; Hendrickson *v.* Appersen, 245 U. S. 105, 112-113; Gunn *v.* Barry, 15 Wall. 610, 623; Seibert *v.* Lewis, 122 U. S. 284, 294-295; Louisiana *v.* New Orleans, 102 U. S. 203, 206.) Also this court has held that a vested right of action is property. (Pritchard *v.* Norton, 106 U. S. 124, 132; Angle *v.* Chicago, etc., Ry. Co., 151 U. S. 1, 19; Muir *v.* L. & N. Ry. Co., 247 Fed. 888, 897.)

8. That the holding of the California Supreme Court in its decision that the repeal of Section 3 of Article XII of the Constitution of California extinguished rights of action based thereon and contracts growing out of the obligation imposed by said section involves a grave question of vital importance to the public, and the failure of this court to grant its writ and review this decision would be accepted by the bench, bar and public as an approval by this court of the holding of the California Supreme Court.

9. That by its decision, holding as above stated, the Supreme Court of California has denied to petitioner rights and privileges under the contract clause of Section 10 of Article I of the United States Constitution and rights and privileges petitioner is entitled to under the decisions of this court, as above cited, which said rights and privileges were set up and claimed in the Supreme Court of California by petitioner.

10. The demurrer in this case admits that Getz Bros. & Company was a corporation; that Milton E. Getz was one of its directors; that petitioner was one of the creditors of said corporation; that officers of said corporation had embezzled $550,000.00 belonging to the corporation; that petitioner sued respondent as a director in behalf of himself and all other creditors to recover the amount of said embezzlement together with all other facts well pleaded.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme

Court of California, at San Francisco, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket S. F. 13939, Peirce Coombes, plaintiff and appellant, *vs.* M. G. Franklin, Milton E. Getz, Mo. Meyer, and S. O. Meyer, defendants; Milton E. Getz, respondent, and that said judgment of the Supreme Court of California may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

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GEORGE B. HARRIS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the Supreme Court of California in this case has not yet been officially reported, but is reported as Coombes *v.* Franklin *et al.*, 1 Pac. (2d) 992. Said opinion is copied in the record (R. 37). The opinion of the Supreme Court of California on the petition for rehearing is not yet officially reported, but was filed October 23, 1931, and will be found in the record (R. 51).

II.

Jurisdiction.

1. The date of the judgment of the Supreme Court of California is July 23, 1931 (R. 37). Petition for rehearing was denied August 21, 1931 (R. 50), and the opinion of the court denying the petition for rehearing was filed October 23, 1931 (R. 51).

2. The jurisdiction of this court is invoked in this case upon the ground that the decision of the Supreme Court of California which is a final decision of the highest court in that State, holding that the repeal of Section 3 of Article XII of the California Constitution extinguished and abated petitioner's cause of action under said section of the constitution impaired petitioner's and other creditors' contracts and thereby denied to petitioner rights and privileges under the contract clause of Section 10 of Article I of the United

States Constitution which claim was specially set up and claimed by petitioner in said court as provided under Section 344, Title 28, U. S. Code.

3. Petitioner set up and claimed in the Supreme Court of California under Section 344, Title 28, U. S. Code, that the repeal of Section 3 of Article XII of the California Constitution did not extinguish and abate his cause of action in this case arising out of and under the obligation created by said section of the California Constitution and the holding of the California Supreme Court as herein stated impairs the obligation of petitioner's and other creditors' contracts and destroys vested property rights in violation of the contract clause of Section 10 of Article I of the United States Constitution which was set up and claimed by petitioner.

4. Petitioner specially set up and claimed in the California Supreme Court that the repeal of Section 3 of Article 10 of the California Constitution did not extinguish and abate petitioner's cause of action in this case and the holding of said court that the repeal did extinguish and abate petitioner's right of action in this case is in conflict with numerous decisions of this court which hold that the repeal of similar constitutional and statutory provisions do not act retroactively so as to impair the obligation of contracts arising out of or under said provisions, and that said holding and decision of the California Supreme Court impairs the obligation of petitioner's contract in violation of the contract clause of Section 10 of Article I of the United States Constitution.

5. That the material portion of Section 10 of Article I of the United States Constitution referred to herein as the "contract clause" of said section and which is violated by the opinion and decision of the California Supreme Court in this case, is as follows:

> "No state shall * * * pass any * * * law impairing the obligation of contracts * * *"

6. The cases upon which petitioner relies to establish this court's jurisdiction and to determine whether the opinion of the California Supreme Court is erroneous and violates the contract clause of Section 10 of Article I of the United States Constitution are:

III.

Statement of the Case.

A full statement of the facts in this case has been given under heading "A" in the petition, and in the interest of brevity the statement is not to be repeated at this point.

IV.

Specification of Errors.

1. The Supreme Court of California erred in finding and holding that the repeal of Section 3 of Article I of the California Constitution extinguished and abated petitioner's cause of action in this case which had accrued and become vested before the repeal.

2. The California Supreme Court erred in its finding and holding in this case that the repeal of Section

3 of Article XII of the California Constitution acted retroactively so as to extinguish and abate petitioner's right of action and its holding that its decision in this respect did not impair the obligation of contracts under the contract clause of Section 10 of Article I of the United States Constitution.

3. The California Supreme Court erred in its findings and holdings that petitioner's right of action was created solely by Section 3 of Article XII of the California Constitution and is dependent upon it alone without regard to the vested property rights that had accrued to petitioner by virtue of his contract under said section.

4. The California Supreme Court erred in finding and holding that the petitioner's right of action that had accrued and become vested was not a property right, and that the remedy for its enforcement was not a vested property right, which said holding denies to petitioner rights guaranteed under the contract clause of Section 10 of Article I of the United States Constitution.

5. The California Supreme Court erred in finding and holding that Section 3 of Article XII of the California Constitution making directors of a corporation responsible for embezzlement of its funds, which said section created a direct and primary contract between the directors and creditors and not to the corporation, was one of the laws concerning corporations which could be repealed under the reserved power in Section 1 of Article XII of the California

Constitution, the repeal of which would destroy all rights and obligations created thereunder.

6. The Supreme Court of California erred in finding and holding that the remedy given creditors against directors of a corporation under the provisions of Section 3 of Article XII of the California Constitution was not a vested property right when a contract had been created and a cause of action accrued under the provisions of said section before its repeal.

V.

Summary of Argument.

POINT "A". The decision of the California Supreme Court, holding that the repeal of Section 3, Article XII, of the California Constitution acts retroactively, impairs the obligation of contracts, for it admits in its opinion on the petition for rehearing that the obligation of petitioner under Section 3 of Article XII of the California Constitution was contractual.

POINT "B". The decision of said court is in conflict with numerous decisions of this Court holding that the repeal of a constitution or statute that acts retroactively impairs the obligation of contracts created under it before its repeal.

POINT "C". "Liability" as used in Section 3 of Article XII of the California Constitution with reference to the obligation of stockholders and directors has the same meaning in referring to the obligations of either.

POINT "D". This Court has held that the nature and character of liability under constitutions and statutes

similar to Section 3 of Article XII of the California Constitution is a direct obligation between stockholders and creditors and not an obligation to the corporation and is contractual.

POINT "E". The effect of an amendment or repeal of laws concerning corporations under the reserved power cannot impair existing contracts or destroy vested property rights.

POINT "F". The opinion of the California Supreme Court holding that the remedy given by Section 3, Article XII, California Constitution, is not a property right is in conflict with numerous decisions of this Court holding a remedy is a property right if its destruction renders a contract unenforceable.

POINT "G". A vested right of action is property within the contract clause of Section 10 of Article I of the United States Constitution and is protected by said section of the constitution against arbitrary interference where it springs from contract.

POINT "H". The opinion of the California Supreme Court holding the repeal of Section 3 of Article XII of the California Constitution operated retroactively so as to impair existing contracts is in conflict with numerous opinions of this Court.

POINT "I". The demurrer in this cause admits all facts pleaded.

VI. ARGUMENT.

Point "A".

Decision Impairs Obligation of Contracts.

The California Supreme Court has consistently held, and so states in its opinion denying a rehearing in this case (R. 51), that the obligation of directors to creditors under former Section 3, Article XII, California Constitution was contractual (Dean *v.* Shingle, 198 Cal. 652, 663-4, and citations). As petitioner's cause of action stated in the complaint was contractual and had accrued and become vested prior to the repeal of said section of the California Constitution, then the holding of the California Supreme Court that the repeal of said section extinguished and abated petitioner's cause of action impaired the obligation of contracts in violation of the contract clause of Section 10, Article I, United States Constitution, as a State Constitution is a "law" within the meaning of the prohibition against passing any law that will impair the obligation of contracts contained in Section 10, Article I, of United States Constitution. (New Orleans Gas Company *v.* Louisiana Light Company, 115 U. S. 650, 672; Louisiana *v.* Jumel, 107 U. S. 711, 760; Railroad Company *v.* McClure, 10 Wall. 511.)

Point "B".

Conflict with Prior U. S. Supreme Court Decisions.

This Court has held in many cases that the obligations created by and arising out of similar constitu-

tional and statutory provisions was contractual, and that the repeal of such constitution or statute did not extinguish the contractual obligations that had accrued thereunder before the repeal, and that to hold the repeal would extinguish the obligations accrued thereunder before the repeal would impair the obligation of contracts in violation of the contract clause of Section 10 of Article I of the United States Constitution.

In Ochiltree *v.* Railroad Company, 21 Wall. 249 (88 U. S. 249), the court had under consideration the effect on existing obligations of the repeal of a Missouri constitutional provision relating to the liability of stockholders which is almost identical with Section 3 of Article XII of the California Constitution. The court said:

> "The incident of individual liability attached to and formed a part of the contract as long as it lasted, but its repeal did not deprive the plaintiff of any of the rights secured to him when the contract was made. They still exist, and the remedy to enforce them remains the same. If the corporation itself cannot pay, the members who composed it at the time of the repeal are unaffected by it, and there is nothing in the way of subjecting them to the double liability provision."

In Hawthorne *v.* Calef, 2 Wall. 10 (69 U. S. 10), the court had under consideration a decision of the Maine Supreme Court as to the effect of the repeal of a statute creating a stockholders' liability similar to that in Section 3 of Article XII of the California Constitution, and it was held by the court of Maine, as in

the opinion of the California Supreme Court in this case, that the repeal of the statute extinguished rights of action against stockholders under the statute. This Court reversed the Supreme Court of Maine and said:

> "The creditor had this security when the debt was contracted with the company over and above its responsibility. This remedy the repealing act has not merely modified to the prejudice of the creditor, but has altogether abolished, and thereby impaired the obligation of his contract with the company."

In Irvin *v.* Elliott, 203 Fed. 82, the court had under consideration the effect of the repeal of an Ohio constitutional provision relating to liability of stockholders similar to the stockholders' liability provision of Section 3 of Article XII of the California Constitution, and the court Syllabus 1 of the opinion is as follows:

> "1. *Corporations* (*Sec.* 251)—*Insolvency—Stockholders—Statutory Liability—Constitutional Provisions.* Where a stockholder of an insolvent Ohio railroad company acquired his stock prior to the adoption of a constitutional amendment November 3, 1903, relieving stockholders from the double liability imposed by Ohio Const. 1851, art. 13, Sec. 3, the stockholder's liability was not affected by the amendment."

POINT "C".

Meaning of "Liability" As Was Used in Section 3 of Article XII of the California Constitution.

"Liability" as used in the above section of the constitution in fixing the responsibility of both stock-

holders and directors has the same meaning for, as said in State *v.* Skaggs, 154 Ala. 249:

> "Where a word or phrase is repeated in a constitution or statute, and in one instance its meaning is definite and clear and in the other it is susceptible of two meanings, it will be presumed to be employed in the same sense in which it was used in the place where its meaning was clear."

In Miller *v.* Dunn, 72 Cal. 462, where the court had under consideration the interpretation of words used in a constitution, it said, on page 466:

> "A word repeatedly used in a statute will bear the same meaning throughout the instrument, unless it is apparent that another meaning is intended."

Also see 12 *C. J.* 699, Sec. 42; and Knight *v.* Shelton, 134 Fed. 423, 426.

Since the liability of the directors to creditors is the same character of liability as the liability of stockholders to directors, then we may look to the decision of the courts in determining the character of the liability of stockholders under similar constitutional and statutory provisions in order to determine the character of the liability of directors under Sec. 3, Article XII, Calif. Const.

POINT "D".

Nature and Character of Liability under Section 3 of Article XII of California Constitution.

This Court has on numerous occasions had under consideration the nature and character of the liability

of stockholders to creditors under constitutional and statutory provisions similar to Section 3 of Article XII of the California Constitution, and has held that the liability under such statutes and constitutions was not to the corporation, but to the creditors, and was direct and primary, and the same construction has been placed upon this section of the California Constitution by the Supreme Court of California.

In Converse *v.* Hamilton, 224 U. S. 243, this court had under consideration a Minnesota constitutional provision making stockholders liable to creditors for debts in an amount equal to their stock. The court said, on page 253:

> "This liability is not to the corporation but to the creditors collectively, and is not penal but contractual, is not joint but several."

In Aronson & Co. *v.* Pearson, 199 Cal. 286, the California Supreme Court said, on page 291:

> "The stockholders' liability is direct, immediate and enforceable independently of proceedings against the corporation. In equivalent phrase, the liability is primary and original, and not secondary."

In Platt *v.* Wilmot, 193 U. S. 602, this court said of a stockholder's liability under a similar constitutional provision, on page 613:

> "Also, while the liability is contractual in its nature, it arises out of the *constitution*, or the statute, or from a combination of both, by virtue of the application of general principles

of law to the facts in the case. Neither the constitution nor the statute says that the liability is *contractual*, but, as the constitution and statute existed, the liability arising therefrom, as against the stockholder, is because of the principle of law which works out a *contractual* liability upon these facts, and it may be fitly described as the common law."

Also see the following cases:

Selig *v.* Hamilton, 234 U. S. 652, 658;
Bernheimer *v.* Converse, 206 U. S. 516;
Whitman *v.* National Bank, 176 U. S. 559, 563-567;
12 *C. J.* 977, Sec. 566 (5);
14 *C. J.* 973.

POINT "E".

Effect of Amendment or Repeal under Reserved Power.

The reserved power to amend or repeal laws concerning corporations does not carry with it the right to impair contracts or destroy vested rights of property, and the contract sued on in this case was made and a vested right of action had accrued thereon before the repeal of Section 3 of Article XII of the California Constitution.

In Vol. 7, Fletcher on Corporations, page 7597, Sec. 4310, the author says:

> "A reservation of the power to alter, amend or repeal the charter of a corporation gives the legislature no right to destroy or impair the vested rights of the corporation or its stockholders or creditors."

Also, on page 7604, Sec. 4316, of the same volume, the author says:

> "The reserved right of amendment, alteration or repeal; whether contained in a statute or constitutional provision, must be exercised in subjection to the various other constitutional commands and restrictions. Thus the power is subject to the provisions against impairing the obligations of contracts, and the right to amend does not authorize the taking of a corporation's property without just compensation. But the legislature may enact any legislation, by way of amendment which does not violate the rule that property acquired under the operation of the charter cannot be taken away and that *contracts* made in like manner may not be impaired."

In Greenwood *v.* Freight Co., 105 U. S. 13, this court said, on page 19:

> "Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the court may, if the legislature does not provide some special remedy, enforce such rights by the means within their power."

In Tomlinson *v.* Jessup, 15 Wall. 454, this Court had under consideration this reserved power to amend or repeal, and said, on page 459:

> "The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State. Rights ac-

> quired by third parties, and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing; but of such rights it is unnecessary to speak here. The State only asserts in the present case the power under the reservation to modify its own contract with the corporators; it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired."

In Shields *v.* Ohio, 95 U. S. 319, the court said, beginning at the bottom of page 324:

> "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. * * * Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanction and are as inviolable as in other cases."

In Lakeshore, etc., Ry. Co. *v.* Smith, 173 U. S. 684, this Court had under consideration the power of the legislature to amend or repeal and in speaking of the legislature's power, this Court said on page 690:

> "It has no right even under such circumstances to take away or destroy the property or annul the contracts of a railroad company with third persons."

From these authorities it is clear that the repeal of Section 3 of Article XII of the California Constitution

could not extinguish contractual obligations arising thereunder between the directors and petitioner, a creditor.

POINT "F".

Remedy is Property Right.

The opinion of the California Supreme Court on the petition for rehearing held that the remedy given under Section 3 of Article XII of the California Constitution was not a vested property right. This holding is in conflict with the opinions of this Court, and most courts, which hold that a remedy is a property right when its destruction would prevent the enforcement of a contract as the California Supreme Court has held it has done in this case.

In Gunn *v.* Barry, 15 Wall. 610, this Court said, on page 623:

> "The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A State may change them, provided the change involve no impairment of a substantial right. If the provision of the constitution, or the legislative act of a State, fall within the category last mentioned, they are to that extent utterly void. They are, for all the purposes of the contract which they impair, as if they had never existed. The constitutional provision and statute here in question, are clearly within that category, and are, therefore, void."

Also see Hendrickson *v.* Apperson, 245 U. S. 105, 112-113 and citations.

In Seibert *v.* Lewis, 122 U. S. 284, this Court discussed this question very fully on pages 294 and 295, and held that the remedy was a property right.

POINT "G".

A Right of Action is Property.

On the date of the repeal of the section of the California Constitution under consideration petitioner's cause of action had already accrued and the suit had been filed thereon, and a right of action is a property right and its destruction impairs the obligation of contracts in violation of the Federal Constitution.

In 2 Cooley on Constitutional Remedies, page 756, the author says:

> "But a vested right of action is property, and is equally protected against arbitrary interference. Where it springs from contract, or from the principles of the common law, it is not competent for the legislature to take it away."

In Pritchard *v.* Norton, 106 U. S. 124, this Court said, on page 132:

> "Hence, it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away."

Angle *v.* Chicago, etc., Ry., 151 U. S. 1, 19;

Muir *v.* L. & N. Ry. Co., 247 Fed. 888, 897.

Point "H".

Operation of Amendments.

Constitutional provisions as well as statutes are construed to operate prospectively only, unless on the face of the instrument or enactment the contrary intention is manifest beyond reasonable question. The opinion of the California Supreme Court in holding that the repeal of Section 3 of Article XII of the California Constitution acted retroactively so as to impair the obligation of contracts is in conflict with all the opinions of this Court on the subject.

Shreveport *v.* Cole, 227 U. S. 36, 43.

Point "I".

Demurrer Admits Facts Pleaded.

Since a demurrer was sustained to the complaint in this action, then all matters well pleaded are admitted to be true, and it is therefore admitted by the demurrer that the petitioner was a creditor of Getz Bros. & Company, that Milton E. Getz was a director of that company, that officers of Getz Bros. & Company had embezzled or misappropriated money of the corporation to the amount of about $550,000, and that petitioner sued Milton E. Getz as one of the directors of this corporation, on behalf of himself and all other creditors of the corporation to recover the amount of $550,000 embezzled by officers of said corporation.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that justice may be done, and that to such end a writ of certiorari should be granted and this Court should review the decision of the Missouri Supreme Court and finally reverse it.

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